BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
GARFINCKEL, BROOKS BROTHERS,)
MILLER & RHOADS, INC.)

For Appellant: Ronald E. Ruberti
Controller

Albert D. Nemecek, Jr.
Vice President

For Respondent: Mark McEvilly
Counsel

O P I N I O N

This appeal is made pursuant to section 25666 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Garfinckel, Brooks. Brothers, Miller & Rhoads, Inc. against proposed assessments of additional franchise tax in the amounts of $6,586.41, $4,501.11, and $4,380.00 for the income years ended January 31, 1971, January 31, 1973, and January 31, 1974, respectively, and pursuant to section 26076 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Garfinckel, Brooks Brothers, Miller. & Rhoads, Inc. for refund of franchise tax in the amount of $393.70 for the income year ended January 31, 1972,

Appeal of Garfinckel, Brooks;
Brothers, Miller & Rhoads, Inc.

The issues presented are (1) whether certain items are to be excluded in computing appellant's sales factor, (2) whether certain income is includable in appellant's apportionable business income, and (3) whether final federal adjustments to income were applied to appellant's taxable income.

Appellant is a Virginia corporation which began doing business in California in 1957. During the years 1971 through 1974, appellant and its subsidiaries operated retail department and specialty stores in sixteen states and the District of Columbia. Appellant's franchise tax returns were filed on the basis of a combined report, using the standard three-factor apportionment formula to determine the amount of its business income subject to tax in California.

After examination of appellant's California returns for the income years ended January 31, 1971, 1972, 1973, and 1974, respondent recomputed appellant's sales factor and business income and applied federal adjustments to its taxable income. Notices of proposed assessment were then issued for the income years ended January 31, 1971, 1973, and 1974, and a Notice of Proposed Overpayment was issued for the income year ended January 31, 1972. Appellant timely protested the proposed assessments and filed a claim for refund on the proposed overpayment. Several modifications to the computations were made at the protest level, after which the proposed assessments were affirmed. The claim for refund apparently was not acted upon by respondent, and the inaction was therefore deemed a denial of the claim for refund, appealable pursuant to Revenue and Taxation Code section 26076. This timely appeal followed.

We note first the well-established principle that respondent's determinations are presumptively correct and appellant has the burden of proving them incorrect. (Welch v. Helvering, 290 U.S. 111, 115 [78 L.Ed. 212] (1933); Todd v. McColgan, 89 Cal.App.2d 509, 514 [201 P.2d 414] (1949).) The presumption is not overcome by mere unsupported statements. (Todd v. McColgan, supra; Appeal of First Federal Savings and Loan Association of Altadena, Cal. St. Bd. of Equal., April 20, 1960.)

With regard to the sales factor computation, appellant contends that sales made by departments leased to others, related workroom and alteration receipts, commissions from leased departments, certain dividend

and interest income, sales taxes, and service'charges were all improperly excluded by respondent; Respondent has conceded that the sales taxes,. service charges, and interest income for the income years ended January 31, 1971, 1972, and 1973, should be included in the sales factor computations. It also points out that it has included the leased department commissions in its computations, as shown in the exhibits to its brief.

As to the remaining contested items, appellant has merely stated that the leased department sales are included "in all financial reports." With no other arguments or evidence presented in support of appellant's position, we cannot say that respondent's determination of the sales factor is erroneous.

Appellant further contends that respondent's determination of its apportionable business income is erroneous because of the inclusion of certain rental income and what it characterizes as the "extraordinary capital gain" of one of its subsidiaries. Again, appellant has failed to present any evidence regarding these items and argues only that the inclusion of the alleged capital gain is "unfair." Respondent indicates that appellant's records and returns do not show any such gain to have been separately reported. In this posture, we have no basis for finding error in respondent's determination of apportiohable business income.

Appellant states that its taxable income for the income year ended January 31, 1972 was increased by respondent when the federal adjustments were applied, even though the final federal adjustment showed a reduction in taxable income of $22,640.00. It also contends that its taxable income for the income year ended January 31, 1973 was increased by $819,733.00, when the federal adjustments resulted in an increase of only $676,484.00. The amounts objected to by appellant were apparently used by respondent in its original determinations. However, upon receiving evidence of the final federai adjustments from appellant, respondent applied those amounts to appellant's taxable income insofar as appropriate under California law, resulting in a decrease of $32,755.00 for the year ended in 1972, and an increase of only $642,266.00 for the year ended in 1973. Therefore, appellant's objection is no longer pertinent. No objection being made to respondent's revised figures, we sustain respondent's determination on this point.

Appellant has failed to show any error in respondent's determinations. Therefore, subject to its concessions[1], we sustain respondent's action as to the proposed assessments and reverse the denial of the claim for refund.

1/ Respondent has conceded to the following changes as reflected in exhibits to its brief marked J-l through J-3:

1. Income year ended January, 1972--overassessed tax amount increased from $393.70 to $595.00;

2. Income year ended January, 1973--proposed additional tax decreased from $4,501.11 to $4,020.00; and

3. Income year ended January, 1974--proposed additional tax decreased from $4,380.00 to $4,325.00.

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O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 26077 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Garfinckel, Brooks Brothers, Miller & Rhoads, Inc. for refund of franchise tax in the amount of $393.70, for the income year ended January 31, 1972; be and the same is hereby reversed, subject to respondent's concessions; and pursuant to section 85667 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protests of Garfinckel, Brooks Brothers, Miller & Rhoads, Inc. against proposed assessments in the amounts of $6,586.41, $4,501.11, and $4,380.00 for the income years ended January 31, 1971, January 31, 1973, and January 31, 1974, respectively, be and the same is hereby modified to reflect respondent's concessions. In all other respects, the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 29th day of July, 1981, by the State Board of Equalization, with Board Plembers Mr. Dronenburg, Mr. Reilly, Mr. Bennett and Mr. Nevins present.

Ernest J. Dronenburg, Jr., Chairman

George R. Reilly, Member

William M. Bennett, Member

Richard Nevins, Member

_____, Member